No. 3899

In the United States Circuit Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,
Plaintiff in Error.

vs.

A. O. ANDERSON & COMPANY, Claimant of 1974 CASES OF CANNED SALMON LABELED IN PART "Hypatia Brand Pink Salmon" SHIPPED BY ALASKA HERRING & SARDINE CO. CANNERY,
Defendant in Error.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

HON. EDWARD E. CUSHMAN, *Judge*

BRIEF OF PLAINTIFF IN ERROR

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STATEMENT OF THE CASE

This case is before the court on a writ of error to the District Court of the United States for the Western District of Washington, Northern Division, and comprises a proceeding under the Act of June 30, 1906, (Pure Food and Drugs Act),

seeking the condemnation and forfeiture of 1974 cases of canned salmon. The libel of information on behalf of the United States alleged in substance that the 1974 cases of canned salmon in question constituted a shipment from Port Walter, Alaska, to the City of Seattle, in the State of Washington, arriving at Seattle on or about August 7th, 1920, in interstate commerce; that at the time the libel of information was filed the parcel of salmon was in the same condition as it was when it was shipped from Alaska to Seattle and when it arrived in Seattle and was in the original unbroken packages. The libel of information further alleged that the said 1974 cases of canned salmon were adulterated, under the provisions of Section 7 of the Food and Drugs Act, paragraph sixth under "Food," in that they consisted wholly or in part of filthy, decomposed and putrid animal substance. The salmon in question was seized by the Marshal, under the usual process, and thereafter A. O. Anderson & Company filed its claim as the owner of the salmon and its answer denying the allegations of the libel of information as to the adulteration of the salmon but admitting the interstate character of the shipment. At the trial it was further admitted by the claimant that at the

time of the seizure of the salmon by the marshal it was in the original unbroken packages and was in the same condition as it was when it was shipped from Alaska.

Pursuant to Section 10 of the Act in question, the Government demanded a jury to try the issues of fact as framed by these pleadings and the case came on for trial before said District Court and a jury. The evidence introduced on behalf of the Government showed, substantially, as follows:

E. A. McDONALD, an employee of the Bureau of Chemistry, stationed at Seattle, testified that on January 3rd, 1921, he took what is known as "investigational" sample from the parcel of salmon in question, consisting of 24 cans of salmon taken from 24 different cases and selected at random. This investigational sample, as were the further samples taken by him, was turned over to the United States Food and Drug Laboratory at Seattle for analysis and inspection. That on January 5th, 1921, he took an additional sample from the same parcel of salmon, consisting of 192 cans selected from 192 cases. That in taking this second sample of 192 cans he covered the entire pile of salmon, going into it very exhaustively, covering the top, the sides and the lower tier of the pile.

This second sample was given number 10533-T and was delivered to the Laboratory at Seattle for inspection and analysis. That after the seizure of the salmon under the process issued upon the libel for information, he, in company with a representative of the claimant, took what is known as a "post seizure" sample, consisting of an additional 192 cans selected from 192 additional cases. Mr. McDonald testified that at the time of the taking of this last sample he and the claimant's representative agreed as to which cases should be selected, and that both he and the claimant's representative selected from each of the 192 cases selected a can of salmon. These were also turned over to the Food and Drug Laboratory at Seattle for inspection and analysis. This post seizure sample was given number 14049-T. That in the taking of the post seizure sample, as in the next prior sample, he testified that he covered the entire pile, top, bottom and sides. That the total number of cans taken for analysis represented cans taken from 408 different cases of salmon included in the lot.

The chemist who made the analysis of the first 24-can sample was not available, and although the Government offered in evidence the official

records of the Bureau of Chemistry containing the report of this chemist as to the result of his examination, this offer was refused by the Court, so that the testimony adduced at the trial with reference to the analysis of the samples taken was limited to the two 192-can samples.

ARTHUR W. HANSEN testified that he is in charge of the United States Food and Drug Inspection Station at Seattle. That there was delivered to him for analysis sample No. 10533-T, consisting of 192 cans of canned salmon. That at or about the time he received this sample he personally examined 144 cases of the salmon, preserving the remaining 48 for future analysis. That of the 144 cans of this sample examined he found a total of 28 putrid or tainted cans, and in addition thereto 18 stale cans. He, as did the other expert witnesses, testified that by a "putrid" can is meant one whose odor is offensive to the sense of smell and contains rotten, decomposed salmon, and that by a "stale" can is meant one that clearly shows the beginning of decomposition but not so advanced as in a can referred to as putrid or tainted. That from his examination of the 144 cans he found 19.3 per cent thereof contained putrid, rotten or tainted salmon. He, as did other

expert witnesses called by the Government, testified as to practical experiments he had conducted with reference to the canning of decomposed salmon, and upon the basis of these experiments testified that the salmon contained in the cans analyzed and found to be putrid or tainted was in his opinion putrid, decomposed or tainted salmon at the time it was canned. He further testified that the remaining 48 cans of sample No. 10533-T were examined by him some time subsequently, to-wit, on June 17th, 1922, in company with the following named experts who were later called as witnesses by the Government: Mr. Dill, an employee of the Seattle Laboratory, Food and Drug Station; Dr. Johnson, Dean of the College of Pharmacy at the University of Washington, Seattle; Drs. Hunter and Balcom, of the Bureau of Chemistry at Washington, D. C., the two last mentioned witnesses having come from Washington, to assist in the examination of this salmon. That from the 48 cans referred to, Mr. Hansen found 8 to be putrid or tainted and 1 additional to be stale. That he and the other experts named also examined the post seizure sample No. 14049-T, consisting of 192 additional cans. That from his examination of this last 192 cans he found 35

cans to be putrid or tainted and 12 additional cans stale or partly decomposed. Recapitulating, Mr. Hansen stated that altogether he examined a total of 384 cans of this parcel of salmon, of which he found 71 cans to be putrid or tainted, or 18.4 per cent, and in addition 31 cans, or 8 per cent, to be stale, or a total of stale and putrid cans of 26.4 per cent. He further stated that at the time of the examination of the last 240 cans in the presence of the experts named, each of these individuals made an independent examination of each of the 240 cans. Reference is here made to the cross examination of Mr. Hansen, as contained in pages 10, 11 and 12, of the Bill of Exceptions, wherein he testified that the salmon was examined in lots of twelve, and wherein he testified as to his results with reference to each dozen cans of salmon.

DR. ALBERT C. HUNTER, a bacteriologist in the employ of the United States Department of Agriculture, Bureau of Chemistry, testified that in his examination of the 48 cans of sample No. 10533-T, he found 8 of said 48 cans, or 16.7%, to contain putrid or tainted salmon, and in addition thereto, 18.7% of said 48 cans to contain off or stale salmon. He further testified that of

the 192 cans in sample number 14049-T, he found 39 cans, or 20.3% to be putrid or tainted salmon, and in addition thereto 38 cans, or 19.8% stale or off. In the aggregate he examined 240 cans and found 47 which were putrid or tainted, and in addition thereto 47 cans which were stale or off.

D. B. DILL, a chemist employed by the Bureau of Chemistry at Seattle, testified that of the 48 cans examined from sample No. 10533-T, he found 8 cans putrid or tainted and two additional cans to be stale, making a total of putrid and tainted cans of 16.6%. Referring to the 192-can lot, Sample No. 14049-T, he found 36 of these cans to be putrid or tainted, and 10 additional cans stale, making a percentage of putrid and tainted cans of 18.7%. In the aggregate he examined 240 cans, finding 44 cans putrid or tainted, or a percentage of 18.3%.

DR. C. W. JOHNSON, a professor of chemistry at the University of Washington, and who has been dean of the College of Pharmacy at that institution for nineteen years, testified from his examination of the 48-can parcel of Sample No. 10533-T, that he found 9 putrid or tainted cans, or 18.6%, and an additional six cans which were

stale or off. Referring to the 192-can lot, Sample No. 14049-T, he found 34 putrid or tainted cans, or 17.6%, and in addition thereto 13 stale or off cans. In the aggregate, he examined 240 cans, his examination disclosing 17.9% putrid or tainted cans, and in addition thereto 7.9% stale.

DR. R. WILFRED BALCOM, an assistant to the chief of the Bureau of Chemistry at Washington, testified that from his examination of the 48 cans from Sample 10533-T, he found a total of 9 putrid or tainted cans, or 18.75%. In addition thereto he found 7 additional cans which he would classify as off or stale cans, or a percentage of between 14 and 15% stale or off cans. Referring to the 192-can sample No. 14049-T, he found a total of 39 cans either putrid or tainted, or 23.3%. In addition thereto he found 29 cans, or approximately 15%, which were off or stale.

There is copied below, for the convenience of the court, Government's Exhibit No. 1, which is a recapitulation of the testimony of the various experts who examined the salmon in question, showing the similarity of the results obtained by these various experts, and the similarity of the degree of decomposition running through the various samples taken:

Exhibit No. 1

F. and D. No. 14262

	Putrid or Tainted	Stale
A. W. Hansen, 384 cans from 384 cases	71 cans or 18.4%	31 cans or 8.0%
C. W. Johnson, 240 cans from 240 cases	43 cans or 17.9%	19 cans or 7.9%
D. B. Dill, 240 cans from 240 cases	44 cans or 18.3%	12 cans or 5.0%
		Off Including Stale
A. C. Hunter, 240 cans from 240 cases	47 cans or 19.5%	47 cans or 19.5%
R. W. Balcom, 240 cans from 240 cases	48 cans or 20.0%	36 cans or 15.0%

Average of all Analysts:

Tainted or Putrid..... 18.8%

Stale or Off..... 10.7%

Reference is made to the Bill of Exceptions for a more complete statement as to the Government's testimony. The Government's testimony showed beyond all question that the samples were exhaustive and representative, that they were fair

samples, and that the last 192-can sample was taken by agreement with the claimant as being a representative sample of the pile. The testimony of the Government further showed beyond any question that approximately 20% of the salmon in question is rotten, putrid and decomposed salmon, and in addition thereto that the parcel consists of a large per centage of stale or off salmon.

At the close of the Government's testimony it was announced by counsel for the claimant that the claimant had no evidence to introduce in its behalf and thereupon moved the court for an instructed verdict upon the ground that there was no evidence that would justify the court in permitting the matter to go to the jury and because there was no evidence that would justify the entry of a judgment of forfeiture in the cause. This motion was granted by the trial court, a verdict for the claimant was returned as directed by the court, and thereafter a judgment was entered upon the verdict dismissing the proceeding and ordering the marshal to return the salmon to the claimant.

The court, in granting the motion for a directed verdict, held in substance that the word "article" as used in the Pure Food and Drugs Act

meant in this case the individual can of salmon, and that until the Government was prepared to show that each individual can was adulterated within the meaning of the Act it was not entitled to a decree of forfeiture. The court said in part:

"I still adhere to the view that the 'article' of the statute is the single can of salmon, just as much so as if you had a herd of cattle, a part of which were tubercular and the rest were not; a single head of stock would be the article; we would not conclude that the entire herd of cattle were to be destroyed because ten per cent or twenty per cent of them were tubercular.

"There you have means of testing the individual animal, but the great inconvenience that arises by reason of the nature of a can of salmon in testing it by any means known has brought about this attempt to fix a standard.

"I am impressed with the proposition that the housewife or cook would be able to protect the consumer against impurities of the nature described in the testimony here. The reason I am convinced of that is that there does not appear to be any substantial or any striking difference between the percentages given by those men who are experienced in examining salmon, who do not resort to chemical tests, and those witnesses who have resorted to chemical tests. The men who are used to examine salmon simply relying on their eyes and their noses have discarded and found impure practically the same percentage of salmon that those chemically

testing it have done; I am not sure but what they have rejected on an average more than those who have chemically tested the salmon.

"I do not say that the Department, after investigation, where the product was in bulk, where you could treat the bulk as the article, might not reasonably adopt a standard, because there are more or less impurities in all food—it is a common expression that 'every one has to eat his peck of dirt sometime'—and they would be justified in resorting to percentages, but I do not conceive that if you take a number of articles of which you may find ten per cent or twenty per cent of the articles impure, that they are justified in condemning or asking the court to condemn the remaining articles that are not impure.

"The exigencies of the case, the danger to the public if the impure article is poisonous, might justify the banning of the entire number of articles and give reason and plausibility to a ruling that that was the intent of Congress. I conclude it does not warrant the court in concluding, in the absence of positive language leaving no room for doubt, that it was the intent to destroy sixteen hundred cases of good salmon out of a total of two thousand cases. So the motion for a directed verdict will be granted. The clerk will prepare the form and the bailiff will call the jury in."

* * * * *

"This law directs that an article in whole or in part decomposed, putrid or—I have not the language before me, but the court ruled that that does not apply; that it applies to bulk articles where

there is a certain percentage of the entire mass that is putrid, but it does not apply to where a percentage of separate articles, such as cans of salmon, are part of them impure; that it does not give the court any authority to destroy the good cans of salmon. Where an article in bulk, like liquid or a mass, is wholly impure, or partly impure, you can treat the whole of it as one thing, but you are not warranted, in law, in treating cans of salmon as one thing."

Reference is made to the Bill of Exceptions for the complete text of the court's opinion.

ARGUMENT

I. *The ruling of the Court that "The 'Article' of the statute is a single can of salmon" was erroneous.*

(a) A reading of the Food and Drugs Act furnishes a fair interpretation of the word "article."

(b) There is a distinction between the terms "article" and "package" as used in the Food and Drugs Act.

(c) If the interpretation of the court below is affirmed, the past procedure under the Food and Drugs Act must be radically revised.

II. *There was sufficient evidence to warrant the submission of the case to the jury.*

(a) A case should not be withdrawn from a jury unless no recovery could be had upon any view the evidence tended to establish.

III. *The Court erred in directing a verdict on the ground that approximately 1600 cases of good salmon must be destroyed in order to destroy the approximately 400 cans of adulterated salmon distributed throughout the parcel of* 2000 *cases.*

(a) The very determination was in itself a question of fact for the jury.

(b) Question of destruction was not for the jury and the jury's determination on the facts would not have necessitated a consideration of the final disposition of the seized goods. While the question of destruction was for the court, yet its determination was premature, in that it could not arise until after a verdict had been returned in favor of the Government.

(c) It is a well established principle of law that "contraband" goods under the Food and Drugs Act may be followed wherever found and where confused goods are intermingled with other like property, the owner of these goods must lose his

rights unless he is able to separate out his property.

(d) The burden of distinguishing his goods, in case of a confusion of property, is placed on the wrong-doer—the one who produces the confusion.

IV. *A construction should not be applied to a statute which renders it inoperative and which negatives the avowed purposes of the act.*

(a) Nothing in the Food and Drugs Act to indicate that Congress did not intend to include canned and package goods within the provision of Section 10.

(b) An act should be given that construction which will permit of carrying out its avowed purposes.

I.

The ruling of the court that "the 'article' of the statute in a single can of salmon" is erroneous.

It is the Government's position at the outset that the word "article" or "article of food" used in the Food and Drugs Act is used in the generic sense and is to be interpreted as "food product" or "food commodity." An examination of the Food and Drugs Act supports this interpretation. The

title of the Act reads as follows: "An Act for preventing the manufacture, sale, or transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines and liquors, and for regulation of traffic therein and for other purposes." Foods as used in the title, is undoubtedly used in the generic sense. It will be noted that the use of the word is not qualified in any manner and that the expression "articles of food" is not used.

Section 1 provides "That it shall be unlawful for any person to manufacture within any territory or the District of Columbia *any article of food or drug* which is adulterated or misbranded." "Any article of food" in this section may be said to be synonymous with "food products" or "food commodity" and to be synonymous with the word "foods" as used in the title.

Section 2 provides "That the introduction into any state or territory * * * from any other state or territory * * * of any article of food or drugs which is adulterated or misbranded * * * is prohibited; and any person who shall ship or deliver for shipment * * *, or who shall receive in any state or territory or the District of Columbia from any other state * * *, and

having so received, shall deliver, in original unbroken packages, * * * *any such article* so adulterated * * * or misbranded * * *, or any person who shall sell or offer for sale in the District of Columbia or the territories of the United States any such adulterated or misbranded food or drugs * * * shall be guilty of a misdemeanor." Congress evidently contemplated that "any article of food or drugs" might be contained in a plurality of packages since in the foregoing section it used the expression "in original unbroken packages." Otherwise, if Congress has intended to give the restrictive meaning to the word "article" it would have been necessary to use the expression in the foregoing section "in an original unbroken package." That Congress meant the above use of the word "article" is further shown by the remaining part of Section 2, which reads: "And for such offense be fined not to exceed $200." "Such offense" undoubtedly refers back to, among other things, "and having so received, shall deliver, in original unbroken packages * * * any such article so adulterated or misbranded." In other words one of the offenses under the Act is delivering after receipt in interstate commerce any adulterated or misbranded

article of food in original unbroken packages. Congress in plain language there interprets the word "article" to mean the commodity or product and plainly provides for the punishment for its delivery after it is enclosed in a plurality of original unbroken packages. It is the Government's contention that the shipment of the commodity however enclosed or contained, whether in one package or 96,000 packages, as in the instant case, is the offense.

Sections 3 and 4 provide for the collection and examination of "specimens of foods and drugs." Section 4 provides that examination of "specimens of foods and drugs shall be made * * *, for the purpose of determining from such examinations whether *such articles* are adulterated or misbranded." This can only be interpreted to mean that "such article" refers back to "food and drugs." It does not refer to "specimens" otherwise this section would read "for the purpose of determining whether such specimens are adulterated or misbranded;" the fair interpretation of "such articles" must be *such products or such commodities.*

An examination of Section 10 also sheds some light on the intention of Congress relative to the interpretation of the word "article." The terms

"drug" and "food" as used throughout the Act are obviously used in the broad sense. For instance Section 6 provides "that the term 'drug' as used in this Act, shall include all medicines and preparations * * * and any substance or mixture of substances." There are no qualifying words used with respect to the term drug nor to the term medicines, preparations or substances, they being referred to as articles of medicine in the generic sense. Section 6 defines food to include, all articles used for food, drink, confectionery or condiment by man or other animals, whether simple, mixed, or compound." That phrase would have exactly the same meaning if the word "article" were stricken out and the word "product" or "commodity" inserted in its place.

Section 7 describes the various cases of adulteration under the Act. In the case of drugs paragraph one provides: "If, when a drug is sold under or by a name recognized in the United States Pharmacopoeia it differs from the standard of strength, quality or purity as determined by the test laid down in the United States Pharmacopoeia." Drug there is used in the broad sense and "it" refers to the broad class of drugs, otherwise the section would read "an article of drugs" or language of similar import.

In the case of food the same section provides that if any substance has been mixed or packed with it, or if any substance has been substituted wholly or in part for the article, or if any valuable constituent has been wholly or in part abstracted, or if it be mixed, colored, etc., in a manner whereby damage or inferiority is concerned, or if it contains any added poisonous or other added deleterious ingredients, or if it consists in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance, then the "article" or "product" may be said to be adulterated.

It is the sixth paragraph under Section 7 that the libel in the present case is based on. It is the Government's contention that "it" as used in paragraph six refers to the general class or commodity or product and not to the particular can into which the product is packed. The section reads as follows: "If it consists in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance, or any part of an animal unfit for food, whether manufactured or not, or if it is the product of a diseased animal or one that has died otherwise than by slaughter."

Section 8, which describes misbranding, carries out the same or similar references to "drugs,"

"articles of drugs," "foods" and "articles of foods." Sub-paragraph first under Paragraph 4, Section 8, further illustrates the Government's contention with respect to the interpretation of the word "article." It reads: "In the case of mixtures or compounds which may be now or from time to time hereafter known as articles of food, under their own distinctive names, and not an imitation of or offered for sale under the distinctive name of another article, if the name be accompanied on the same label or brand with a statement of the place where said article has been manufactured or produced." It is plain in this section that the term "articles of food" describes the commodity in the broad sense. In fact it was this section that the Supreme Court had in mind in the case of the *United States vs. 40 barrels and 20 kegs of Cocoa Cola*, 241 U. S. 265, in which Mr. Justice Hughes said: "A distinctive name is a name that distinguishes. It may be a name in common use as a generic name, e. g., coffee, flour, etc. Where there is a trade description of this sort by which a product of a given kind is distinctively known to the public, it matters not that the name had originally a different significance. Thus, soda water is a fair trade description of

an article, which now, as is well known, rarely contains soda in any form." It is undoubtedly true that the Supreme Court in this decision had in mind that soda water was an article of food and used the term article in the sentence above quoted in the same sense that Congress intended it should be used in the Act.

In the case of *McDermott et al vs. Wisconsin*, 228 U. S. 115, Mr. Justice Day said: "The Food and Drugs Act was passed by Congress, under its authority to exclude from interstate commerce impure and adulterated food and drugs and to prevent the facilities of such commerce being used to enable such articles to be transported throughout the country from their place of manufacture to the people who consume and use them, and it is in the light of the purpose and power extended in its passage by Congress that this Act must be considered and construed. *Hippolite Egg Company vs. U. S.*, 220 U. S. 45." While the Court in the foregoing did not attempt to interpret the word "article" it will be noted that the term "such articles" in the foregoing quotation refers back to "food and drugs" which are undoubtedly used in the broad sense. "Such articles" could be stricken out of the foregoing paragraph and the word

"products or commodities" inserted without changing the meaning. In the same decision the word "package" is interpreted to mean the immediate container of the article in which it is enclosed for consumption by the public. It is significant that the Court said, "Within the limitations of its right to regulate interstate commerce, Congress manifestly is aiming at the contents of the package as it shall reach the consumer, for whose protection the Act was primarily passed, and it is the branding upon the package which contains the article intended for consumption itself which is the subject matter of regulation." In view of the fact that Congress was aiming at the contents of the package, it may be said that it is the commodity in the case of adulteration that Congress is seeking to regulate rather than the specific package or the can in which the commodity is contained.

The foregoing theory is further substantiated by the case of *United States vs. 7 cases etc., Eckmen's Alterative*, 239 U. S. 510 in which Mr. Justice Hughes said: "But the question remains as to what may be regarded as "illicit" and we find no ground for saying that Congress may not condemn the interstate transportation of swindling preparations designed to cheat credulous suf-

ferers and make such preparations, accompanied by false and fraudulent statements, illicit with respect to interstate commerce, as well as, for example, lottery tickets."

A situation which is not dissimilar to the present controversy arose in the District of Colorado, in the case of the *United States vs. 462 Boxes of Oranges*, Notices of Judgment 5402. In condemning the entire shipment because a substantial percent of decomposed oranges were intermingled with the sound oranges, Judge Lewis said:

"There is no doubt about the facts in this case, but I think there is question as to whether or not the facts bring the shipment within the terms of the Act of Congress. We declined to meet this question heretofore in connection with a shipment of apples; that is, we refused to issue the writ of seizure. The charge was that some of the apples were rotten, but on preliminary inquiry it appeared that many of them were sound—were in good condition for use, and could be readily seen and separated from the unsound. It is pretty difficult to face our minds from the idea of deception in the sale of this kind of fruit in the condition that the evidence shows these oranges are, and yet that element ought to be eliminated, because the Act of Congress in no sense undertakes to reach the purpose of the Act by bringing within its terms any fraudulent conduct in the sale of the article. *You can not determine*

the condition of an orange from looking at it as you can an apple. Now, the evidence, I take it, does bring the shipment within the literal terms of the act; the oranges were decomposed on the sense that on account of prior freezing they were undergoing a deteriorating change; that is, a large per cent of them."

In the case of *United States vs. 5060 Cans of Tomato Pulp*, Notices of Judgment 5527, Judge Landis treated the word "article" as refering to the product. Throughout his charge to the jury on numerous occasions, he spoke of the product, "Tomato Pulp" etc., as synonymous with "article," typical instances are quoted:

"Gentlemen of the Jury, in this case there is one fact for you to find, and that fact is whether or not the *product* involved in this inquiry was composed, in whole or in part, of decomposed or filthy vegetable substance."

Again he says:

"Now, it is not a question solely whether this *stuff*—I do not use the word "stuff" in any significant way—*this article*, is fit or unfit for food."

And again:

"The question is, whether or not in manufacturing the ten per cent bad tomatoes did go in, or the five per cent did go in, that is the question, and if you find it did, your verdict will have to be

against the *Tomato Pulp*, even though you believe that you could eat the *whole cargo of the product* without suffering any evil consequences."

It is evident that Judge Landis took the view that "article" as used in the Act referred to the product or commodity.

In the case of *United States vs. 408 Bushels of Oysters in Shells*, Notices of Judgment 4922, Judge Hand treated the word "article" as refering to the product. In his charge to the jury he said:

"There is one other thing that I have not mentioned: certain oysters were examined, other oysters were not examined. The oysters examined, were, of course, very few as compared with the large bulk of 408 bushels of oysters. If you condemn the other oysters which have not been tested here at all, that is, individually, specifically, you will have to find, of course, in the first place, that there was found filth in the oysters that were examined; in the second place that those were fair specimens, so that the other portion of the 408 bushels were similar, and would be properly condemned with those that were actually found to contain excrement. So the question is first whether any of these oysters were filthy to a substantial degree. If you find the oysters examined were filthy to a substantial degree, and that is the result of your finding, and you find there is a preponderance of evidence to that effect then those

would be condemned. If you find they were fair samples of the rest, then you would condemn the rest."

In the case of the *United States vs. Watson, Durand-Kasper Grocery Company*, Notices of Judgment 5543, in which the product was candy in buckets, a persuasive argument is found which tends to substantiate the Government's position that "product" is the article or that the "entire parcel" is the article. In ruling on the question as to what was the unit of the offense, Judge Pollock said:

"In such case may the Government's case out of the single transaction of sale, purchase, and shipment constitute more than one offense under the terms of the Act? Under the provisions of the Act, it is seen to be its purpose, by Section 1, to prohibit within territory under the jurisdiction of the United States, the manufacture or misbranding of foods and drugs. By Section 2 of the Act to prohibit the shipment or offer for shipment in interstate commerce of adulterated or misbranded *food or drug products.* Conceding, therefore, the candy complained of in this case was adulterated in violation of the Act, yet, as there was but a single sale, purchase, and shipment of the adulterated product, as the entire matter charged grew out of a single transaction and a single shipment, it must follow the plaintiff can carve out of this single transaction but a single offense. Although

there were 250 pails of candy shipped, yet here, as under the provisions of the Twenty-eight Hour Law, the shipment made or offered by the defendant must be taken as the unit, although it may consist of many parcels. No greater reason appears for dividing the shipment in question under the Food and Drugs Act, all being comprehended under the general term "confectionery," into different lots or parcels than would appear for making the many different head or cars of stock a separate violation of the Twenty-eight Hour Law. (*B. & W. Southwest Railroad vs. U. S.*, 220 U. S. 94.)"

If the interpretation placed on the word "article" by the court below in the case at bar is allowed to stand, it will necessitate a radical revision of the procedure under the Food and Drugs Act, procedure which has been in use throughout the various District Courts since the passage of that Act. Pleadings have been uniformly prepared on the assumption that the "article" was the "product" or the "lot," and each count, in the criminal informations, have been drawn to cover each particular shipment of adulterated or misbranded food or drugs. The new procedure would require that each count cover each particular can or package, and would result in the Food and Drugs Act becoming a drastic measure, in many instances the counts on each shipment might run

into the hundreds. In the present case, if a criminal charge should be instituted, over a hundred counts could be brought, on the basis of the showing made by the Government's evidence in the court below. There should be a very convincing reason advanced, before a time-honored procedure should be overturned, and before so drastic a construction should be placed on the act, as is suggested by the interpretation of the court below.

This argument is reenforced by the case of *Elliott vs. Railroad*, 99 U. S. 573, wherein it was held that penalties are never extended by implication; they should be expressly imposed or they cannot be enforced. If the lower court's construction of the word "article" be adopted in the enforcement of this statute its penalties will be increased a hundredfold—an extreme result, wholly opposed to the reasonable accomplishment of the remedial purposes of this law.

II.

There was sufficient evidence to warrant the submission of the case to the jury.

It is the Government's position that there was ample evidence to warrant the submission of the case to the jury. The question of fact raised by

the pleadings, as to whether the salmon libeled was composed in whole or in part of filthy, decomposed or putrid animal substance, and was therefore adulterated, was one for the determination of the jury on the evidence, and the court erred in failing to submit that question to the jury.

The record clearly establishes the fact that of the salmon examined 18.8 per cent was tainted or putrid and an additional 10.7 per cent was stale or off. This showing was undoubtedly sufficient evidence to justify the case going to the jury, and even if the ruling of the court below that "the 'article' of the statute is a single can of salmon" is correct, yet, since there was evidence that over 100 cans of the various samples examined were putrid and tainted, and many more stale or off, the court erred in refusing to let the case go to the jury on that showing alone. Even if the jury could not find on the evidence that all of the shipment was adulterated, yet it could have determined that those 100 cans examined were adulterated and the verdict could have been returned under instruction of the court as to that amount. (*U. S. vs. 1000 Cases of Canned Tomato Puree*, Notices of Judgment 4597.)

(a) A case should not be withdrawn from a jury unless no recovery could be had upon any view the evidence tended to establish.

It is axiomatic that "the case should not have been withdrawn from a jury unless the conclusion followed, as a matter of law, that no recovery could be had upon any view which could be properly taken of the facts the evidence tended to establish." (*Texas & Pacific Ry. Co. vs. Cox*, 145 U. S. 606.) See also *Bradley vs. U. S.*, 264 Fed. 79.

It certainly cannot be said that "no recovery could be had" in the instant case, where the evidence plainly established that at least a portion of the shipment was composed of cans containing putrid, tainted and stale salmon.

III.

The court erred in directing a verdict on the ground that approximately 1600 cases of good salmon must be destroyed in order to destroy the approximately 400 cans of adulterated salmon distributed throughout the parcel of 2000 cases.

In the ruling on the motion by the claimant for a directed verdict the court below based his reason for granting the motion on the following grounds: "The exigencies of the case, the danger to the

public if the impure article is poisonous, might justify the banning of the entire number of articles and give reason and plausibility to a ruling that that was the intent of Congress. I concluded it does not warrant the court in concluding in the absence of positive language, leaving no room for doubt, that it was the intention to destroy 1600 cases of good salmon out of a total of 2,000 cases, so the motion for a directed verdict will be granted."

This ruling, evidently based on a misconception of the Act fails to disclose a convincing reason for the ruling. Even granting, for the purpose of this argument, that Congress did not intend that where adulterated food was hopelessly intermingled with unadulterated food, the whole might be destroyed if there was no practicable manner of sorting or reconditioning, still the Court was in error in taking the matter from the jury without first having that fact determined by the jury.

In order for the Court to reach the determination that some 1600 cases of the parcel of salmon seized were unadulterated, it was obviously necessary to pass on a question of fact which was properly one for the jury. It was not admitted by the

claimant that 400 cases of the product was bad, and it was not testified to by any of the Government's witnesses that 1600 cases of the product were unadulterated. The assumption on which the ruling was based could only be arrived at by a series of deductions which only a jury could rightfully make.

There is no doubt but that the Court at the proper stage in the trial could have passed on the very point of law on which the motion to direct a verdict was based. After a verdict had been returned in favor of the Government and the question of the disposal of the condemned goods was properly before the Court, then, and then only, would it have been a matter for judicial determination. Then, and not until then, would it have been proper for the Court to conclude that Congress did not intend to destroy 1600 cases of good salmon because some 400 cases of adulterated goods were intermingled therewith.

It is manifest that the most controlling reason in the mind of the Trial Court for the adoption of the extreme meaning of the word "article" was the apparent necessity of avoiding a construction which would result in the condemnation of the portions of the consignment of food in a mixed

shipment which are uncontaminated. This reason fails to be convincing in view of the possibility of another construction of the Act which placed the disposition of goods after they are condemned as contraband within the discretion of the court. It has been the uniform practice of courts since the adoption of the Food and Drugs Act to permit the sorting of goods after judgment of condemnation and to permit the return to claimant of sound portions of consignments condemned. This judicial discretion which can be gathered from the provisions of Section 10 has never been questioned except in one case where it was exercised against the returning of wholesome goods to claimants who had been found to be persistent violators of this statute. This case is reported in Notice of Judgment No. 7691. In that case Judge Hand declared that the disposition of goods after condemnation was a matter for the exercise of sound discretion by the court.

Section 10 of the Food and Drugs Act provides "that any article of food, drug, or liquor that is adulterated or misbranded within the meaning of this Act, and is being transported from one state, territory, district, or insular possession to another for sale, or, having been transported, remains un-

loaded, unsold, or in original unbroken packages, * * * shall be liable to be proceeded against in any District Court of the United States and within the District where the same is found, and seized for confiscation by a process of libel for condemnation. And if such article is condemned as being adulterated or misbranded, or of a poisonous or deleterious character, within the meaning of this Act, the same shall be disposed of by destruction or sale, as the said Court may direct * * *; Provided, however, that upon the payment of the costs of such libel proceedings and the execution and delivery of a good and sufficient bond to the effect that such article shall not be sold or otherwise disposed of contrary to the provisions of this Act * * * the Court may by order direct that such articles be delivered to the owner thereof."

It will be seen that ample provisions were made by Congress for just such a contingency as would have faced the Court below after a verdict. The seized goods could then have been taken down under bond for sorting or reconditioning, the burden remaining where it originally rested—with the claimant—to see that the goods were properly reconditioned and that they were not sold in

violation of the terms of the Food and Drugs Act. In other words, the claimant was responsible for the filthy, putrid and decomposed fish which were distributed throughout the shipment and after a verdict the responsibility would still be with the claimant to recondition. The Court's present ruling erroneously shifted the burden to the Government to seek out and find each can containing adulterated fish throughout the entire parcel rather than to allow the burden to remain where it originally lay.

It is a well established principle in law that "contraband" goods within the meaning of the Food and Drugs Act may be followed wherever found. *McDermott et al vs. Wisconsin*, (228 U. S. 115). It is also a well established rule that where one fraudulently, wilfully or wrongly intermingles his goods with those of another so that there is no evidence to distinguish the goods of the one from those of the other, the wrong-doer forfeits all of his interest in the mixture to the other.

The Idaho, 93 U. S. 586;
Williams vs. Morrison, 28 Fed. Rep. 873;
Graham vs. Plate, 40 Col. 598;
Beach vs. Schmultz, 20 Ill., 190;
Dunning vs. Stearns, 9 Barb. N. Y. 634;
Jenkins vs. Steanka, 19 Wis. 126.

Where the trespasser sold turpentine and resin to defendant, some of which the trespasser had taken from the unpatented homestead entry, the Government was entitled to recover the value of the whole mass, unless that taken from the homestead was determinable. *Union Naval Stores Co. vs. U. S.* 202 Fed. 491.

It is therefore the position of the Government that the claimant when he shipped a parcel of salmon which contained a substantial portion of cans packed from fish which was filthy, putrid or decomposed—and therefore adulterated—he did so at his own peril and if it is impossible to segregate those cans which contain putrid fish from those containing unadulterated fish the entire shipment should be condemned and forfeited under the provisions of the Food and Drugs Act. As has been previously pointed out, if it is possible to recondition the fish, it should be done under the supervision of the shipper, under the well known theory that in cases of a confusion of property the burden of distinguishing is placed on the wrong-doer, all the inconvenience of the confusion being thrown on the party who produced the confusion and it is for him to distinguish his own property or lose it.

Lehman vs. Kelly, 68 Ala. 197;

Elgin First National Bank vs. Schween, 127 Ill. 580;

Stuart vs. Phelps, 39 Iowa 20;

Hart vs. Ten Eyck, 2 Johns Ch. (N. Y.) 108;

Mayer vs. Wilkins, 37 Fla. 244;

Sampson vs. Rose, 65 N. Y. 411.

The Food and Drugs Act, when read as a whole, also supplies a convincing argument against the court's ruling. Section 2 plainly prohibits the introduction into any state from any other state any article of food which is adulterated, and stamps the act of shipping or delivery for shipment from one state to another as a misdemeanor. It could not be said that the shipper in the present case had not shipped adulterated canned salmon, and it is the theory of the Government that the Act, in Section 10, provides an alternate method of procedure based on the same violation of the Act as that described in Section 2. Is it logical to say, in view of the plain violation of Section 2, that the same goods when attacked under the provisions of Section 10, are not liable to condemnation and forfeiture?

IV.

A construction should not be applied to a statute which renders it inoperative and which negatives the avowed purposes of the Act.

The Court erred in applying a construction to the Food and Drugs Act which would render Section 10 of the Act inoperative with respect to all canned or package goods. Doubtless Congress intended to include package and canned foods within the purview of the Act, inasmuch as the Act contains no intimation to the contrary. Throughout the Act the term "article of food" as used is unqualified and in Section 6 the term is defined as follows: "The term 'food' as used herein, shall include all articles used for food, drink, confectionery, or condiment by man or other animals, whether simple, mixed, or compound." It is also doubtless true that Congress intended to include canned salmon within the foregoing definition, and a construction of the Act which excludes any article which plainly falls within the foregoing definition of food is erroneous.

The great fundamental rule in construing statutes is to ascertain and give effect to the intention of the legislature.

McDermott et al vs. Wis., 228 U. S. 115;
Shulthis vs. MacDougal, 162 Fed. 33;
Blanc vs. Bowman, 22 Col. 23;
People vs. Dana, 22 Col. 11;
People vs. Willison, 237 Ill. 584;
Farmers Bank v. Hale, 59 N. Y. 53.

Every statute must be construed with reference to the object intended to be accomplished by it. (36 Cyc. 1110.)

U. S. vs. Musgrave, 160 Fed. 700;
St. Louis etc. Ry. Co. vs. Delt, 158 Fed. 931;
State vs. Pollman, 51 Wash. 110;
People vs. Dana, 22 Col. 11;
Hathorn vs. Natural Carbonia Co., 149 N. Y. 326.

The construction should be given to a statute which is best calculated to advance its object by suppressing the mischief and securing the benefits intended.

U. S. vs. Jackson, 143 Fed. 783;
Wheeler vs. McCormick, 8 Blatchf. 267.

If the purpose and well ascertained object of a statute are inconsistent with the precise words, the latter must yield to the controlling influence of the legislative will resulting from the whole Act.

Commercial Bank vs. Foster, 5 La. Am. 516;
State vs. Clark, 29 N. J. L. 96;
U. S. vs. Jackson, 143 Fed. 783.

It is submitted that the judgment of the District Court should be reversed, with directions to grant the plaintiff-in-error a new trial.

Respectfully submitted,

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